NO. 35712-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

NHAN THAI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable JoAnne Alumbaugh, Judge

BRIEF OF APPELLANT

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2. The trial court erred by failing to give the appellant's proposed Instruction 25, WPIC 16.08, the "no duty to retreat" instruction. CP 36.

Issues Pertaining to Assignments of Error

1. Is the revised WPIC 16.04, the "aggressor instruction", vague, overly broad, and misleading where an assault defendant's actions leading up to his claim of self defense are predominantly lawful, if not entirely so, and the instruction does not require a finding of unlawful conduct as a predicate to determining the defendant to be an "aggressor"?

2. Was there no substantial evidence to support giving an aggressor instruction where an assault defendant's actions leading up to his claim of self defense consisted of arguing with his domestic partner and touching his partner's hand?

3. Is an assault defendant who asserts a claim of self defense entitled to have the jury

instructed that he had no duty to retreat where the defendant was outside the entrance to his own residence and the evidence is undisputed that the alleged victim struck the first blow during the incident in question?

B. STATEMENT OF THE CASE

1. Procedural Facts

On June 7, 1994, the King County Prosecutor charged appellant Nhan T. Thai with one count of Assault in the Second Degree. CP 1; RCW 9A.36.021-(1)(a). The case was tried before a jury from October 3 to October 6, 1994. 2RP 1; 3RP 1 4RP 1.[1] The jury returned a verdict of guilty on the second degree assault charge. CP 65.

On November 10, 1994 the appellant was sentenced to six months confinement, twelve months community supervision, no contact with Giau Nguyen, DNA blood testing, and the payment of $298.80 in court costs and $684.00 in recoupment of public defense attorney fees. CP 66-68; 5RP 6-7.

2. Facts Relating to Appeal

[1] References to the record of proceedings are as follows: 1RP: 9/30/94; 2RP: 10/3/94; 3RP: 10/4/94; 4RP: 10/5-6/94; 5RP: 11/10/94.

The second degree assault charge against the Nhan Thai arose from an allegation of domestic violence. The state alleged that Thai assaulted his domestic partner, Giau Nguyen, on February 10, 1994 after a party. The state further alleged that Nguyen suffered a broken eardrum from the incident. CP 2-3.

During the trial Nguyen recounted the events of the evening of February 9 and 10, 1994. On February 9 Thai and Nguyen had been living together for approximately seven months, and Nguyen was pregnant by Thai. 3RP 30-32. That evening Thai and Nguyen went out to celebrate the Vietnamese New Year. 3RP 31. On the way home the two had an argument when Thai told Nguyen that someone had been looking at her that evening and Nguyen became angry. 3RP 32. Nguyen refused to go inside when they reached their home, though the hour was late, it was cold outside, and the couple had Nguyen's three year old daughter with them. 3RP 32, 44-45. Nguyen testified she would not go inside because "I wanted him to beg me. . . . I wanted him to beg me until I wasn't mad anymore." She added that she did not want Thai to come in because "I was mad at

him and I didn't want to see his face." 3RP 32-33, 45. Nguyen also stated that she had changed the lock on their door a few days earlier and had not given Thai a key to the new lock. 3RP 33. Eventually, Thai grabbed Nguyen by the hand to try to get her to go inside, but Nguyen pulled her hand away. 3RP 33.

In her anger Nguyen then struck Thai in the face with her keys. 3RP 34, 46. The blow came close to Thai's right eye. 4RP 23. Nguyen testified "I think he was hurt bad. . . ." 3RP 46. Thai testified "My eye was hurting." 4RP 24. At that point Thai struck Nguyen in the face. Nguyen stated she was hit two or three times on the left side of her face. 3RP 34, 46. Thai stated he struck Nguyen two or three times. 4RP 24. He testified he hit Nguyen while in a state of confusion, he was startled when he realized that Nguyen was using her keys as a weapon and afraid of losing an eye. 4RP 23.

On February 11 Nguyen went to her doctor, Theodore Palo, for an obstetrics checkup and complained of pain in her left ear. 3RP 38, 47, 58. Palo observed she had a perforated eardrum.

4RP 10.

The state presented evidence relevant to whether Thai acted reasonably in self defense. Kim Chi Raychen testified to alleged prior inconsistent statements made by Nguyen to police on February 11. Raychen stated that Nguyen told police she was hit six or seven times. 3RP 61. Seattle Police Officer Steven Strand stated Nguyen told him she was hit five times with a closed fist. 3RP 64, 66. Dr. Palo gave his opinion that the ear injury he observed on February 11 appeared to have occurred within the previous ten days. 4RP 10-11.

Nguyen weighs approximately 85 pounds. 3RP 43. Thai is approximately 140 pounds. 4RP 26.

Based on the testimony outlined above, the parties did not dispute that Nguyen initially struck Thai and Thai subsequently hit Nguyen. The central issue regarding the assault element of the criminal charge was whether Thai had acted reasonably in self defense in responding to Nguyen's initial blow to his face. See closing arguments, 4RP 42-45, 50-53, 56-58, 61-62, 64.

The trial court gave the following jury instructions relevant to self defense:

It is a defense to a charge of Assault that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

The state has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the state has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

Instruction 14. CP 59.

Necessary means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended, under the circumstances as they reasonably appeared to the actor at the time.

Instruction 15. CP 60.

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that

> the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

Instruction 16. CP 61.

Thai's defense counsel objected to instruction 16, the aggressor instruction, on the basis that the evidence at trial did not support it. 4RP 33. Thai's counsel also took exception to the court's refusal to give Thai's proposed instruction 25, the "no duty to retreat" instruction, WPIC 16.08. 4RP 35-36. Thai's proposed instruction stated as follows:

> It is lawful for a person who is in a place where that person has the right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP 36.

The court rejected the proposed instruction, apparently in the belief that the instruction can only be given when the defendant is inside his home. 4RP 35.

In closing, the prosecutor argued that Thai should have retreated from the smaller Nguyen:

> [W]hen you read the instructions, I think it will be very clear to you that there is no self-defense issue in this case.

> The defendant said, "She was coming at me with some keys and she poked at me with those keys. An I thought that my eye was going to be out." What does the self-defense instruction say? Even if that were true, even if she came at him with keys, what does the instruction say? You've got to use necessary and reasonable force.
>
> Now you all saw Giau [Nguyen] testify in court. She was a tiny person. She said she weighed 84 pounds. . . .[B]asically, here's this tiny woman who, at the time was seven months pregnant, was there with her child, and was apparently going out like this with keys, according to the defendant, and according to Giau later.
>
> Could he have maybe grabbed her arms, stopped her? Could he have stepped away? . . . .No. He goes and strikes out at her and actually inflicts injury upon her. And that's not reasonable.

4RP 43 (emphasis added).

C. ARGUMENT

The trial court erred by giving Instruction 16, the "aggressor instruction". The instruction was an incorrect statement of law. As such it was misleading, vague, and overly broad.

The trial court also erred in refusing to give Thai's proposed Instruction 25, the no duty to retreat instruction. This instruction was amply supported by the evidence and fundamental to Thai's

claim of self defense.

Each of these errors, standing alone, compel reversal of the appellant's conviction. Taken together, the court's instructional errors offered a lopsided and unsupported explanation of the law of self-defense, crippling the appellant's ability to present his legal defense to the jury.

1. THE TRIAL COURT ERRED BY GIVING INSTRUCTION 16, THE "AGGRESSOR INSTRUCTION".

The purpose of a jury instruction is to furnish guidance to the jury in its deliberations, and to aid it in arriving at a proper verdict. State v. Allen, 89 Wn.2d 651, 654, 574 P.2d 1182 (1978). Jury instructions must not be misleading. State v. Valentine, 75 Wn. App. 611, 616, 879 P.2d 313 (1994); State v. Ortiz, 52 Wn. App. 523, 530, 762 P.2d 12 (1988). An instruction must state the applicable law correctly. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289 (1993). In addition, it is prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). When an instruction is given which is not supported by substantial evidence, the instruction constitutes an impermissible comment on the evidence in violation of the Washington Constitution, article 4, section 16. See State v. Thompson, 47 Wn. App. 1, 8, 733 P.2d 584, rev. denied, 108 Wn.2d 1014 (1987).

Over Thai's objection, the trial court gave Instruction 16:

> No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that

> the defendant was the aggressor, and that defendant's and conduct provoked or commenced the fight, then self-defense is not available as a defense.

4RP 33; CP 61 (emphasis added). This instruction was an incorrect statement of law and consequently misleading, vague, and overly broad. Further, there was no evidence to support giving an aggressor instruction.

a. The Aggressor Instruction was an Incorrect Statement of Law Because the Act Which Provokes a Belligerent Response Must Be an Unlawful Act.

It has always been the law in Washington that an aggressor instruction should be given only when there is evidence that the defendant's unlawful conduct provoked the conflict. See, e.g., State v. Hughes, 106 Wn.2d 176, 193, 721 P.2d 902 (1986) (aggressor instruction warranted where "evidence of unlawful conduct was clear"); State v. Brower, 43 Wn. App. 893, 721 P.2d 12 (1986) (aggressor instruction permitted in cases where "there is evidence [defendant's] wrongful or unlawful acts provoked the affray or deadly conflict"); see also State v. Hardy, 44 Wn. App. 477, 484, 722 P.2d 872, rev. denied, 107 Wn.2d 1010 (1986) (aggressor instruction too vague where the jury may have found defendant to be aggressor when defendant called victim a "whore" and where the jury could have denied defendant his self defense claim for defendant's lawful conduct).

The aggressor instruction given by the trial court used the language of the revised WPIC 16.04. This pattern jury instruction was revised in the wake of State v. Arthur, 42 Wn. App. 120, 708 P.2d

1230 (1985). The Arthur court held that the former instruction was too vague and too broad under the facts of that case. 42 Wn. App. at 125. Former WPIC 16.04 read as follows:

> No person may by any unlawful act create a necessity for acting in self-defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt the defendant was the aggressor and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

42 Wn. App. at 121-22.

In Arthur, the defendant had caused a car accident which led to a confrontation between the defendant and the alleged victim. As a result of the confrontation the defendant was charged with assault. The court held that the phrase "any unlawful act" in the jury instruction could be used to deprive the defendant of his self defense claim as a result of unlawful, but nevertheless unintentional, conduct (by driving negligently or recklessly, for example). The court reasoned such a result was unfair, stating, "An aggressor instruction must be directed to intentional acts. . . ." 42 Wn. App. at 125.

After Arthur, the Washington Supreme Court upheld the use of the same aggressor instruction in

State v. Hughes. In Hughes, the defendant had claimed self defense in the homicide of a police officer during a shootout. The instruction was given in light of evidence that the defendant fired the first shot. 106 Wn.2d at 192. The Supreme Court acknowledged the problem raised in Arthur, but easily distinguished the cases:

> This is also not a case where the defendant's acts could be deemed accidental, as was the situation in State v. Arthur. In the present case, the jury's attention was directed to the defendant's intentional acts (shooting at two policemen) that allegedly provoked the victim's response (shooting back).

106 Wn.2d at 193.

Comparing Arthur and Hughes compels a common-sense conclusion: the former pattern instruction was potentially flawed for failing to include an intent requirement, not for requiring (correctly) that the conduct be "unlawful", as Washington courts have always done.

The revised WPIC 16.04 clarifies that there must be an intentional act to support giving an aggressor instruction. Unfortunately, the newer pattern instruction "throws the baby out with the bath" by discarding the unlawfulness requirement.

The new language is plainly incorrect as a statement of self defense law. In Washington it is simply not true that "any intentional act reasonably likely to provoke a belligerent response" strips the actor of his right to defend himself (calling someone a "whore", for example). The act must be intentional and unlawful. State v. Hardy, supra. Where the former pattern instruction failed in some cases for not requiring intent, the revised version is likewise flawed for not requiring unlawful conduct.

Problems with the former instruction were avoided when the alleged conduct was unambiguously intentional. State v. Hughes, supra. Similarly, the inherent flaw in the revised instruction is dormant when the alleged conduct is unambiguously unlawful. In State v. Cyrus, 66 Wn. App. 502, 832 P.2d 142 (1992), rev. denied, 120 Wn.2d 1031 (1993), the Court of Appeals addressed a challenge to the revised WPIC 16.04. The aggressor instruction was given where there was evidence that the defendant had resisted arrest by police officers who were invited into his home and who had probable cause to arrest. When the police officers

took hold of the defendant he "flailed" at the police and pointed a gun at them. 66 Wn. App. at 504-05. On appeal Cyrus raised a vagueness challenge to the instruction based on Arthur. The court observed that "[t]he jury was asked to determine if Cyrus was justified in assaulting the police or whether his intentional resistance was reasonably likely to provoke the officers' increased use of force." 66 Wn. App. at 508 (emphasis added). Noting that the revised WPIC specifically addressed the intent issue raised in Arthur, 66 Wn. App. at 509, the court upheld the use of the aggressor instruction, stating:

> [The instruction] clearly describes the type of conduct that deprives a defendant of the right to claim self defense. We find the instruction given to be a correct statement of the law and neither vague nor prejudicial as applied to the facts of this case.

66 Wn. App. at 510 (emphasis added).

The significance of the court's holding in Cyrus is that the revised aggressor instruction adequately addresses the vagueness problem on the issue of intent raised in Arthur. Since the alleged conduct in Cyrus (assault/resisting arrest) was unambiguously unlawful, the revised instruction

was not vague or overly broad for failing to require unlawfulness, and the issue was not addressed in the Cyrus opinion.

b. By Stating the Law Incorrectly, the Aggressor Instruction was Misleading, Vague and Excessively Broad. The Jury was Permitted to Deny Thai's Claim of Self Defense Based on Lawful Acts.

The undisputed evidence during the appellant's trial was that Nguyen first struck Thai in the face and Thai responded be hitting Nguyen. The only evidence of any actions by Thai before he was hit was: (1) that he argued with Nguyen after stating that someone had been looking at her that evening, (2) that he implored Nguyen to go inside their home when it was late, it was cold, and Nguyen's daughter was present, and (3) that he grabbed Nguyen's hand to try to get her to go inside—a gesture immediately and decisively rebuffed when Nguyen pulled her hand away.

The only conduct of Thai remotely suggesting unlawfulness was the act of grabbing Nguyen's hand.[2]

[2] One could conceivably suggest that this was an "assault" in the most technical and deminimus of senses. However, there was no evidence that this touching was harmful or offensive. See Argument 1-c below.

Nevertheless, the jury was never instructed to apply the aggressor instruction to unlawful conduct only, or to determine whether the conduct was unlawful. Since Thai's only conduct before being hit in the face was predominantly, if not entirely, lawful, the aggressor instruction was unconstitutionally broad, vague, and misleading. As in State v. Hardy (name calling), the instruction permitted the jury to deny Thai's self-defense claim improperly by finding him to be the aggressor through his lawful conduct.

c. The Evidence at Trial did not Substantiate Giving the Aggressor Instruction.

There was no evidence to justify giving the aggressor instruction. First, an aggressor instruction requires unlawful conduct as its predicate, of which there was none. Second, even in the broad language of the instruction as given there was no act by Thai which was "reasonably likely to provoke a belligerent response" and "create a necessity for acting in self-defense."

Thai committed no unlawful act before he was struck. The only action on his part which even raises a question of unlawfulness was the act of

grabbing his domestic partner's hand, momentarily, late on a cold night to implore her to go inside their mutual residence. The definition of assault relevant to these facts provides as follows:

> An assault is an intentional touching of another person that is harmful or offensive regardless of whether any injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive.

WPIC 35.50.

It is not reasonable to suggest that an ordinary person would be harmed or offended when their domestic partner grabs their hand to implore the person to come in on a cold night. More to the point, there is no evidence that Nguyen in fact found the touching offensive. Her testimony was clear: she was angry before the touching and wanted Thai to beg her to go inside. When he grabbed her hand she pulled it away. Then she hit him. Nguyen was angry——not offended or harmed——and her anger had nothing to do with the touching. There was no evidence to suggest that Thai "assaulted" Nguyen when he grabbed her hand.

Even under the broad language of the aggressor instruction given, Thai did nothing to qualify as

the aggressor. Arguing over what transpired at a party and briefly grabbing Nguyen's hand were hardly acts likely to provoke a belligerent response and create a necessity for self defense.

Giving the aggressor instruction where there was not substantial evidence to support it prejudiced the appellant by permitting the jury to deny him his self defense claim improperly. In addition, the instruction was a comment on the evidence, suggesting to the jury that the appellant's conduct before being struck was "aggressive". Accordingly, Thai's conviction should be reversed.

2. THE TRIAL COURT ERRED BY REFUSING TO GIVE THE APPELLANT'S PROPOSED "NO DUTY TO RETREAT" INSTRUCTION.

Each side in a case is entitled to have the trial court instruct the jury on its theory of the case if there is evidence to support that theory. State v. Benn, supra, 120 Wn.2d 631; State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980). It is reversible error to refuse to give a requested instruction when its absence prevents the defendant from presenting his or her theory of the case. State v. Kidd, 57 Wn. App. 95, 99, 786 P.2d 847, rev. denied, 115 Wn.2d 1010 (1990). A test of sufficiency of instructions is whether counsel "may satisfactorily argue his theory of the case." State v. Hardy, supra, 44 Wn. App. 477.

Thai's attorney excepted to the trial court's refusal to instruct the jury that Thai did not have

a legal duty to retreat from Nguyen. 4RP 35-36. Thai's proposed Instruction 25 was the WPIC pattern instruction 16.08:

> It is lawful for a person who is in a place where that person has the right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

CP 36.

The proposed instruction is a correct statement of the law. See State v. Allery, 101 Wn.2d 591, 598, 682 P.2d 312 (1984); State v. Hiatt, 187 Wash. 226, 237, 60 P.2d 71 (1936); State v. Lewis, 6 Wn. App. 38, 40-42, 491 P.2d 1062 (1971). The defendant is entitled to such an instruction when there is evidence in the record to support it. In Allery, the defendant entered her home and encountered her estranged husband who threatened to kill her. The Washington Supreme Court stated simply:

> Defendant testified that she was afraid and thought she was in danger when she entered her home and found her husband. She testified he threatened to kill her. Her testimony was sufficient to support the proposed instruction. The trial court erred in refusing to instruct the jury that defendant had no duty to retreat.

101 Wn.2d at 598.

Although the no duty to retreat instruction is a correct statement of the law relating to self defense, Washington courts have held it is not required in every case where the defendant raises a self defense claim. For example, the court in State v. Thompson, 47 Wn. App. 1, 733 P.2d 584 (1987) held it was not error to refuse the instruction because the defendant's evidence was that he was retreating when he shot his antagonist. The court stated the instruction would have been superfluous. 47 Wn. App. at 6. In State v. Frazier, 55 Wn. App. 204, 777 P.2d 27, rev. denied, 113 Wn.2d 1024 (1989), the court held the no duty to retreat instruction was not required because the central issue for the jury was to determine who was the initial aggressor, the defendant or the alleged victim: "As in Thompson, whether the defendant should have retreated was simply not an issue." 55 Wn. App. at 208.

The evidence to support the appellant's proposed instruction was substantial and straight-forward. Thai was standing outside his residence, a place where he had a right to be. When he perceived Nguyen hitting him in the face——with a

set of keys, near his eye——he had "reasonable grounds for believing that he was being attacked." Unlike Thompson and Frazier, whether Thai should have retreated was a fundamental issue in the trial. Since it was undisputed that Nguyen was the first to strike a blow, the reasoning of Frazier does not apply. Similarly, since Thai in fact did not retreat, the instruction cannot be deemed superfluous as in Thompson. Thai's trial presented the jury with exactly the kind of evidence where the no duty to retreat instruction is required under Allery. The trial court erred by refusing to give the instruction.

Failure to give the instruction also was prejudicial to the appellant: first, because the jury received a distorted explanation of the law; second, because the instructional error was particularly damning in view of the facts of this case.

The instruction was essential to give the jury a complete, accurate statement of self defense law together with the other instructions given. Instruction 14 informed the jury that force may be used in self defense "when the force is not more

than is necessary". CP 59. Instruction 15 explained: "Necessary means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable. . . ." CP 60 (emphasis added). Together, these instructions inevitably allowed the jury to conclude that retreat was a reasonably effective alternative to the use of force and that the appellant was legally obliged to do so. Failure to instruct otherwise left the jury with a distorted version of self defense law, to the appellant's severe prejudice. Thai's attorney could point to no instruction to tell the jury there was no duty to retreat; thus, she could not "satisfactorily argue her theory of the case." State v. Hardy. In contrast, the prosecutor was able to exploit the error, actually arguing to the jury that Thai should have retreated:

> Could he have stepped away? . . . . No. He goes and strikes out at her and actually inflicts injury upon her. And that's not reasonable.

4RP 43 (emphasis added).

The court's instructional error was particularly devastating to the appellant's self

defense claim in light of the specific facts of this case. In closing argument the state relied heavily on the small stature of the victim and the fact she was pregnant to argue Thai's use of force was not reasonable. 4RP 43, 61-62. The jury, as instructed, could quite naturally conclude that the larger Thai should have retreated as a "reasonably effective alternative to the use of force." In short, where it is obvious that an assault defendant is bigger and stronger than an alleged victim, the no duty to retreat instruction becomes all the more essential to the defendant's self defense claim. Under such circumstances, retreat may often appear to be a "reasonably effective alternative" to jurors not properly instructed in Washington's law of self defense.

By refusing to give the no duty to retreat instruction the trial court prevented Thai's attorney from arguing——and the jury from consider-ing——a crucial component to Thai's self defense claim. The extreme prejudice which resulted merits reversal of Thai's conviction.

3. THE TRIAL COURT'S ERRORS COMBINED TO DENY THAI A FAIR TRIAL.

By giving the aggressor instruction where there was no evidence to support it and by refusing the "retreat" instruction the trial court committed errors which compounded one another. See, e.g., State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992) (cumulative error may deny an accused a fair trial, citing cases). The jury received a lopsided and incomplete statement of the law of self defense, to the advantage of the state. The state exploited the advantage, and Thai did not receive a fair trial.

D. CONCLUSION

For the reasons stated above, this court should reverse the appellant's conviction.

DATED this ____day of June, 1995.

Respectfully submitted,

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_____

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